

Employee Service Determination – Decision on Reconsideration

TN

This is the decision on reconsideration by the Railroad Retirement Board of its determination dated November 8, 2005 (B.C.D. 05-48) (Labor Member dissenting), finding that the services performed by TN¹ who was formerly employed by the Metropolitan Transportation Authority (MTA), did not constitute employee service under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Procedural and Background Information

The MTA is not a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. It operates through a number of subsidiary agencies, two of which are covered employers under the Acts: the Long Island Railroad Company (LIRR) (B.A. No. 1311) and Metro-North Commuter Railroad (B.A. No. 3345). In 1997, legislation was enacted by the State of New York providing for the creation of a MTA police department and the establishment of a traditional police pension for the MTA police officers. Police employees of Long Island Railroad and Metro-North were hired by the new MTA Police Department. On May 21, 1998, the Railroad Retirement Board ruled (in B.C.D. No. 98-92) that the police officers transferred to the MTA Police Department from the Long Island Railroad and/or the Metro-North Commuter Railroad Company were no longer covered under the RRA and the RUIA.²

A subsequent review of MTA operations concluded in 2004 indicated that the MTA Police Department had become a larger organization with more varied duties than it was at the time of the Board's 1998 decision. For example, it had increased its staff from 435 to 727 with the participation in the following additional entities and/or activities: the Highway & Bridge Safety Unit, the K-9 Unit, the Emergency Services Unit, and the Interagency Counterterrorism

¹ That decision also concerned five other individuals. They separately requested reconsideration of that decision.

² It should be noted that in 2002, the U.S. Court of Appeals for the Second Circuit found that an employee of the MTA Police Department who performed services for the LIRR was subject to the Federal Employers Liability Act (FELA). Green v. MTA, 280 F.3d 224 (2d Cir. 2002). In an opinion dated June 6, 2003, the Board's General Counsel advised that the Court's decision in Greene has no effect on the Board's 1998 coverage decision.

Taskforce. In addition, the MTA Police Department provides patrol and/or security details at MTA headquarters and other MTA buildings and provides a detail for protection of the MTA Chairman. MTA officers are assigned to various counter-terrorism task forces. Some MTA officers perform no services for the LIRR or Metro-North Commuter Railroad; others perform services for all MTA agencies. None of the new information obtained supported a conclusion that MTA or its Police Department should be held to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

By letter dated May 5, 2005, counsel for TN requested the Board to credit him with covered service for work he performed for MTA and the LIRR. In B.C.D. 05-48, issued November 8, 2005, a majority of the Board denied that request. This request for reconsideration followed in a letter dated June 30, 2006.

Information Provided In Connection with Request

TN has submitted no additional information with his request for reconsideration. In connection with his original request for service credit, he provided information set out in the following discussion.

TN worked as a uniformed police officer first for the LIRR and subsequently for the MTA. As a LIRR police officer, he worked out of the LIRR's Jamaica Station (Flatbush Avenue in Brooklyn) and Hillside Support Facility. He worked for the LIRR as a patrol officer. At some point he became a detective and on September 19, 1996, he became a sergeant. On January 1, 1998, he was transferred to the MTA at 341 Madison Avenue, New York City, until his retirement on March 2, 2005. He states that after the change of employer, his job remained the same except for the transfer to 341 Madison Avenue, which he states was not an LIRR location. However, he also states that his duties performed for the MTA were the same as for the LIRR except that he also performed operational support duties for both Metro-North and LIRR, with the same supervisors. He states that he "was assigned the same work every day as an Operational support Sergeant by [his] MTA managers who coordinated with LIRR for their police needs." He also states that the LIRR would contact him at MTA Operational Support to let him know what work they were looking to have done. TN advised that in his work for MTA, he completed operational orders with man power, submitted over-time to LIRR for reimbursement of MTA by LIRR, submitted documents to LIRR claims department to arrange for police officers' appearances for depositions and court, and submitted time sheets to LIRR for himself, police officers, and the detective working with him. When he

worked for the MTA he reported to Deputy Chief Ron Masciana and Deputy Chief Kim Rehbein; when he worked for the LIRR he reported to Captain D. Urquhart, Captain E. Krutys, and Captain Ron Masciana.

The MTA provided TN with equipment and supplies, even when he worked for the LIRR. He mentions that as an MTA police officer, he received computer and payroll training (not from the LIRR). When he worked for the MTA, the MTA provided him a uniform allowance.

Discussion and Conclusion

The single most significant factor noted in the Board's initial decision was that the Metropolitan Transportation Authority had the right to assign individuals to a duty station. As noted earlier in this discussion, no new evidence was submitted in connection with the request for reconsideration. The majority's review and reconsideration of the evidence leads us to the same conclusion. After TN became a part of the MTA, the MTA, and not the LIRR, had the sole right to direct what services he would perform and where and how he would perform those services. A majority of the Board finds that the evidence as a whole clearly supports the Board's initial decision that TN was subject to MTA supervision and thus was a MTA employee. As such, his service for the MTA was not employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts.

Accordingly, a majority of the Board affirms on reconsideration its decision of November 8, 2005, and concludes that the service and compensation of TN was not creditable for the period beginning January 1, 1998, when he was transferred to the MTA.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr. (Dissenting)

Jerome F. Kever